A

ROSLAN MAALIK v. PP

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CRIMINAL APPEAL NO: 41S-67-11-2015]
22 DECEMBER 2016

B

CONSTITUTIONAL LAW: *Fundamental liberties – Right to fair trial and procedural fairness – Accused convicted for offence under s. 354 of Penal Code at Magistrate's Court – Allegation that Magistrate delivered judgment without considering accused's final submissions – Whether accused's right to fair trial violated – Whether there was breach of procedural fairness – Whether conviction safe – Whether warranted retrial – Federal Constitution, art. 5(1) – Criminal Procedure Code, s. 174(b)*

C

CRIMINAL LAW: *Penal Code – Section 354 – Offence of assaulting or using criminal force on woman with intent to outrage her modesty – Accused convicted and sentenced to one year imprisonment – Appeal against decision of Magistrate – Allegation that Magistrate delivered judgment without considering accused's final submissions – Whether conviction and sentence safe*

D

CRIMINAL PROCEDURE: *Judgment – Grounds of judgment – Accused charged under s. 354 of Penal Code at Magistrate's Court – Magistrate made contradicting findings of fact based on same set of evidence – Contradiction of findings of fact in accused's defence – Whether Magistrate adequately addressed mind to issue at hand – Whether decision given by Magistrate conveyed reasoned judgment on fact and law*

E

F

The appellant was charged at the Magistrate's Court for assaulting or using criminal force to the complainant ('SP1') with the intent to outrage her modesty, an offence under s. 354 of the Penal Code. At the end of the prosecution's case, the Magistrate found SP1 to be a non-credible witness and following that, held that the prosecution failed to establish a *prima facie* case. The appellant was acquitted and discharged without being called to enter defence. However, the Magistrate's ruling was reversed by the High Court upon appeal by the prosecution. The matter was remitted for continued trial before the same Magistrate and the appellant was ordered to enter his defence. The appellant's defence of consent was rejected by the Magistrate as, in a turn of events, SP1 was regarded as a credible witness and her testimony was accepted. The appellant was found guilty of the charge and sentenced to one year's imprisonment. Dissatisfied with the Magistrate's decision, the appellant filed the present appeal on the grounds that (i) his right to a fair trial had been violated as the Magistrate delivered her judgment without considering his final submissions; she merely flipped the papers in the court file as if looking for the written submissions and, without anything more, proceeded to pronounce her judgment; (ii) the Magistrate failed to judicially appreciate the evidence; and (iii) the grounds of judgment did not convey a reasoned judgment of the facts and law.

G

H

I

Held (allowing appeal; setting aside conviction and ordering retrial before another Magistrate):

(1) The appellant had, post-judgment, requested for a soft copy of the court recording transcript ('CRT recording') to view the audio-video record of proceedings of the trial. The Magistrate's Court provided the CRT recording along with additional notes of proceedings. In the additional notes of proceedings, it was recorded that the submissions had been filed and were already in the court's file, when, according to the appellant, this was not the case. The CRT recording, which was played in open court, showed that the Magistrate had proceeded to deliver her judgment without referring to the appellant's written submissions. The contents of the additional notes of proceedings and the CRT recording, when taken together, seemed to support the appellant's narration of events that had transpired in court before the Magistrate delivered her judgment. The Magistrate had directed the appellant to sum or make his closing arguments in writing. She must then go the complete mile and ensure that the submission, when filed, was considered. It was improper for the court to direct or order the filing of written submissions and then not have regard to it. (paras 8 & 12)

(2) A literal interpretation of the words 'may sum up his case' in s. 174(b) of the Criminal Procedure Code ('the CPC') means that the statute gives a discretion or choice to the accused to address the court at the close of the case. The court would be called upon to consider the closing address of the accused only if the accused had chosen to exercise his rights as prescribed in s. 174(b) of the CPC. This address may be made orally or in writing, if so directed by the court. Procedural fairness is an important and integral element of a criminal trial. The purpose of giving the accused the right to sum up his case at the close of trial is to ensure that the accused is given all opportunity to present his case and move the court. (para 12)

(3) Procedural fairness had been sacrificed at the altar of justice and that should not be so. The appellant was deprived of his constitutional right to procedural fairness when his closing submissions were not considered by the court. This was a clear infringement of the appellant's constitutional rights. In the interest of justice, the conviction ought to be set aside and a new trial ordered before another Magistrate. (para 16)

(4) The Magistrate failed to provide reasons for her about-turn in finding SP1 a credible witness. This showed that the Magistrate had not adequately addressed her mind to this issue, more so when the High Court, in calling for the appellant to enter his defence, did not touch on the issue of SP1's credibility at all. (para 21)

(5) The Magistrate made two contradicting findings of fact based on the same set of evidence; one at the close prosecution's stage while the other was at the close of the defence case. The contradicting findings of fact went to the crux of the appellant's defence which was that the act complained of was done with the consent of the complainant. Therefore, the decision given by the Magistrate was not a reasoned judgment on the facts and the law. (para 24)

Case(s) referred to:
Balasingam v. PP [1959] 1 LNS 8 HC ***(refd)***
Diana Nelson Tanoja v. PP [2010] 3 CLJ 1 FC ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Mahindar Singh v. PP [1941] 1 LNS 39 CA ***(refd)***
Mohammad Hasnizam Hussein v. PP [2015] 1 LNS 433 CA ***(refd)***
National Union of Bank Employees v. Director General of Trades Unions & Anor [2015] 10 CLJ 62 CA ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 174(b), 181(1)
Federal Constitution, art. 5(1)
Penal Code, s. 354

For the appellant - Ng Fun Boon & Nathan Krishenan; M/s Ng Fun Boon & Co
For the respondent - Rozaliana Zakaria; DPP

[Editor's note: Appeal from Magistrate Court, Alor Gajah; Arrest Case No: 83-28-08-2013.]

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] The appellant/accused, Roslan bin Maalik, was charged in the Alor Gajah Magistrate's Court with an offence under s. 354 of the Penal Code and the charge read:

> Bahawa kamu pada 25/06/2013 jam lebih kurang 12.30 malam, semasa berada di Comel Beach Resort, Pantai Kampung Hailam, Pengkalan Balak, di dalam Daerah Alor Gajah, dalam Negeri Melaka, telah menggunakan kekerasan jenayah terhadap seorang perempuan Melayu Nama: Siti Nurliana Bte Abu Hanipah, KPT: 900323-01-5340, berumur 23 tahun 3 bulan dengan cara memeluk dan mencium badan pengadu, menindih badan kamu ke badan pengadu dan mencium mulut serta mengesel kemaluan kamu ke kemaluan pengadu dengan niat hendak mencabul kehormatannya. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 354 Kanun Keseksaan.

[2] At the close of the prosecution's case, the learned Magistrate found that the prosecution had failed to establish a *prima facie* case. Thus, the appellant was acquitted and discharged without being called to enter his defence.

[3] The Public Prosecutor appealed that decision and the High Court reversed the Magistrate's ruling and ordered that the appellant enter his defence to the charge. The matter was then remitted for continued trial before the same Magistrate at Alor Gajah.

[4] The appellant elected to testify under oath and called an additional witness on his behalf. At the close of the defence case, the learned Magistrate found that the prosecution had proved its case beyond reasonable doubt and thus found the appellant guilty of the charge, and sentenced him to one year's imprisonment commencing from 29 October 2015.

[5] The appellant being dissatisfied with that decision of the learned Magistrate appealed against both the conviction and sentence to the High Court. Counsel for the appellant and respondent filed their respective written submissions and upon request of counsel I heard further oral arguments in open court. Having perused the appeal record and further having considered the submissions of counsel for the appellant and the learned Deputy Public Prosecutor, I had allowed the appeal and ordered a retrial before a different Magistrate. The reasons for that decision are as follows.

[6] I have, at the outset, reminded myself of the principle that an appeal is a continuation of proceedings by way of a rehearing and that it throws open all the evidence to re-examination in order to determine whether the findings of the trial court are correct and supported by cogent evidence. See *Balasingam v. PP* [1959] MLJ 193 HC; and *Mohammad Hasnizam Hussein v. PP* [2015] 1 LNS 433 CA. I have dealt with this appeal in light of that principle.

[7] The appellant in the petition of appeal has laid down three main grounds of appeal. The first of the appellant's complaint is that the learned Magistrate failed to consider the appellant's counsel's written submissions at the close of the defence case before delivering judgment. The notes of proceedings states as follows:

> Mahkamah setelah mendengar keterangan OKT dan saksi pembelaan, **meneliti hujahan kedua-dua belah pihak** mendapati behawa pihak pembelaan telah gagal untuk menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Sebaliknya mahkamah ini mendapati bahawa pihak pendakwaan telah Berjaya membuktikan kes melampaui keraguan munasabah. Maka OKT didapati bersalah dan disabitkan. (emphasis added)

However, learned counsel for the appellant submits that this not an accurate reflection of what transpired at the proceedings before the learned Magistrate read out her decision. Learned counsel for the appellant submits that the

learned Magistrate had not read or considered his written submissions before delivering judgment. He says that he had, in accordance to directions given by the learned Magistrate at the close of the defence case, filed his written submissions. When the case was called up on the date fixed for delivery of judgment on 29 October 2015, the learned Magistrate enquired if counsel had filed his written submissions, to which learned counsel for the appellant replied that he had and showed proof of acknowledgment by the court registry. The learned Magistrate then flipped the papers in the court file as if looking for the written submissions, and without anything more proceeded to pronounce her judgment finding the appellant guilty of the offence. Learned counsel for the appellant contends that the learned Magistrate had delivered judgment without considering his final closing submissions, which he was directed by the court to file, and that is a breach of the appellant's constitutional right to a fair trial.

[8] Learned counsel for the appellant had post-judgment written to the Magistrate's Court at Alor Gajah for a soft copy of the Court Recording Transcription ("CRT") in order to view the audio-video record of proceedings on the day in question. Following that request, the Magistrate's Court provided a CD of the CRT recording and also sent to the appellant's solicitors additional notes of proceedings captioned "Nota Keterangan Tambahan" in which the following is added to the earlier "Nota Keterangan":

Mahkamah:	Pembelaan sudah failkan hujahan?
Peguam K. Nathan:	Sudah pada 2 Oktober 2015. (Surat iringan ditunjukkan kepada Mahkamah bagi membuktikan hujahan telah difailkan.)
Mahkamah:	**(Hujahan telah difailkan. Ada dalam fail Mahkamah.)**

Learned counsel pointed out to the court that the above bold and underlined words in the "Nota Keterangan Tambahan" ie, (Hujahan telah difailkan. Ada dalam fail mahkamah.) were never uttered by the Magistrate during proceedings and that this is corroborated by the CRT recording. Learned counsel for the appellant asked permission for the CRT recording to be played in open court, and I allowed it. Having viewed the relevant parts of the CRT video recording, it is evident that the learned Magistrate had proceeded to deliver her judgment without having referred to the appellant's counsel's written submissions. The "Nota Keterangan Tambahan" is not part of the record of appeal compiled by the Magistrate's Court. In fact it ought to have been made a part of the record of appeal. Nevertheless, the contents of the "Nota Keterangan Tambahan" and the CRT recording, when taken together, seems to support the learned appellant's counsel's narration of events that had transpired in court before the learned Magistrate delivered

her judgment on 29 October 2015. In any event, the learned Deputy Public Prosecutor has not challenged or contradicted this narration of events by the learned counsel for the appellant.

[9] Learned counsel for the appellant further submits that he had filed his written submissions on 2 October 2015 and the decision was delivered on 29 October 2015, on which date the learned Magistrate had enquired of counsel if he had filed his written submissions. However, counsel points out, that the "alasan penghakiman" (p. 96 of the appeal record) is dated 29 September 2015, and submits that this would mean that the judgment had been done well before the written submissions were filed and the learned Magistrate had definitely not considered the written submissions of counsel for the appellant before making her finding that the prosecution had proved its case beyond reasonable doubt and convicting the appellant.

[10] The learned Magistrate in pronouncing judgment said that she had "meneliti hujahan kedua-dua pihak", when in fact the evidence shows that she had not. Learned counsel for the appellant therefore submits that this is an appealable error on the part of the learned Magistrate as it amounts to a misdirection and draws support for that contention from the pronouncement of the Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, where Gopal Sri Ram FCJ in delivering the judgment of the court held that:

> In our judgment, the constitutionally guaranteed right in an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case. It is a right that he or she may waive. But he or she cannot be deprived of it. That unfortunately is what happened here. The accused accordingly did not have a fair trial and art. 5(1) was violated. … In our judgment, a trial court must, at the close of the prosecution case, invite submissions from an accused. It is then open to the accused to say that he or she does not wish to make a submission. But if he or she does not make that election, he or she must be heard. It is however open to the court, after it has heard those submissions to reject them and call for the defence without affording the prosecution a right to reply. This course does no harm to the prosecution. But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him or her of the opportunity to make a submission of no case.

Now, according to the Federal Court in *Lee Kwan Woh* the accused person's right to submit at the close of the prosecution's case is a constitutional right and a deprivation of that right is a violation of art. 5(1) of the Federal Constitution which provides that "No person shall be deprived of his life or personal liberty, save in accordance with law". The Federal Court in that case also held that the right to a fair trial, which encompasses procedural fairness, is an integral part of art. 5(1) and the denial of the right to make submissions at the close of the prosecution's case would amount to a denial of a fair trial. See also *Ong Ah Chuan & Koh Chai Cheng v. PP* [1980] 1 LNS

181; [1981] 1 MLJ 64, PC. Learned counsel for the appellant argues that the same principle should apply at the close of the defence case, and that the appellant ought to be given the right to make submissions at this closing stage and when such address is made the learned Magistrate ought to consider them before making the final decision to acquit or otherwise.

[11] The learned Deputy Public Prosecutor, whilst conceding that the CRT recording, and the combined effect of both set of notes of proceedings, was indicative of the fact that the learned Magistrate had not referred to or read the appellant's counsel's closing arguments, contends that this is not an appealable error. The thrust of the learned Deputy Public Prosecutor's submissions in this regard is found at p. 30 of her written submission, which is reproduced below:

> Adalah dihujahkan bahawa segala isu-isu yang ditimbulkan semasa kes pembelaan telah pun diperhalusi dan dinilai oleh Puan Majistret sepertimana penilaian keterangan yang dibuat dalam Alasan Penghakiman di akhir kes pembelaan. Pada masa yang sama, terdapat isu-isu yang telah pun diputuskan di akhir kes pendakwaan yang masih lagi di timbulkan di akhir kes pembelaan, yang mana isu-isu tersebut telah pun diputuskan oleh Hakim Mahkamah Tinggi semasa mengenepikan keputusan Majistret terdahulu.
>
> Dalam hal ini, walaupun Puan Majistret yang bijaksana dikatakan telah gagal menikmati dan menghalusi Hujahan Pembelaan tersebut, ianya sama sekali tidak menafikan hak perayu untuk mendapatkan satu perbicaraan yang adil kerana isu-isu yang ditimbulkan telah pun dipertimbangkan mengikut lunas-lunas dan prinsip-prinsip undang-undang betul.
>
> Namun begitu, jikalau Mahkamah yang mulia ini tidak bersama kami dalam hal ini, adalah dihujahkan bahawa pada peringkat ini Mahkamah yang mulia ini selaku mahkamah yang mendengar rayuan boleh mempertimbangkan segala keterangan peringkat pembelaan dan menilai semula kes secara keseluruhannya dalam memutuskan bahawa pendakwaan telah sesungguhnya berjaya membuktikan kes melampaui segala keraguan munasabah terhadap perayu.

The learned deputy is in effect arguing that even if the appellant's counsel's written submissions had not been taken into account by the learned Magistrate, that does not mean that the appellant was deprived of a fair trial as the learned Magistrate had taken into account all evidence adduced a trial in coming to her decision. The learned deputy further argues that in any event as the appeal is a re-hearing the appellant could put forth the submissions made at the close of the defence case for the consideration of this appellate court. In this regard, learned deputy has referred to the case of *Mohammad Hasnizam Hussein lwn. PP* [2015] 1 LNS 433, where the Court of Appeal proceeded to hear the appeal even without the grounds of decision being supplied by the trial court and reviewed all the material available in

the record of appeal before arriving at its decision to affirm the trial court's findings. Similarly, the learned deputy suggests that this court in exercising its appellate jurisdiction can do likewise. And by way of a rehearing consider all the evidence and written submissions of both parties, which are found in the record of appeal.

[12] Now, despite their lengthy oral and written submissions, both counsel for the appellant and the learned deputy had omitted to address the court on one very crucial element, and that is the relevant statutory provisions in the Criminal Procedure Code as regards the procedure to be followed at the end of the defence case in a summary trial at the Subordinate Courts. That statutory provision is found in s. 174(b) of the Criminal Procedure Code (Revised 1999) ("CPC") which provides that:

> In summary trials under this Chapter:
>
> (a) ... ...
>
> (b) when the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf may sum up his case; and
>
> (c) ...

The equipollent provision for trials at the High Court is s. 181(1) of the CPC, which provides:

> (1) When the accused is called upon to enter on his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses, if any, and after their cross-examination and re-examination, if any, may sum up his case:
>
> Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:
>
> Provided also that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

In my view a literal interpretation of the words "may sum up his case" in s. 174(b) of the CPC, would mean that the statute gives a discretion or choice to the accused to address the court at the close of the case. The court would be called upon to consider the closing address of the accused only if the accused had chosen to exercise his rights as prescribed in s. 174(b) of the CPC. This address may be made orally or in writing, if so directed by the court. And in interpreting rights accorded to an accused person the court would also have regard to the purpose of the statutory provision. In this case

I am of the opinion that the purpose of giving the accused the right to sum up his case at the close of trial is to ensure that the accused is given all opportunity to present his case and move the court. Procedural fairness is an important and integral element of a criminal trial. That is the very reason why the Federal Court in *Lee Kwan Woh* had stated that the right of an accused to submit no case to answer at the close of prosecution's case is a constitutional right to a fair right. Now, if the right to submit no case to answer, ie, that the prosecution has not established the threshold *prima facie* case at the close of its case, is a constitutional right, then surely the right to submit that the prosecution has failed altogether at the close of defence case, ie, to proof its case beyond reasonable doubt, must equally be a constitutional right. To hold otherwise would be absurd. After all the judicial decision making process necessarily means the court must not forget that the rights accorded in the Federal Constitution means both substantive as well as procedural rights. See *National Union of Bank Employees v. Director General of Trades Unions & Anor* [2015] 10 CLJ 62; [2014] 6 AMR 143 CA. In the present case the learned Magistrate had directed counsel for the appellant to make his closing arguments or summing up in writing. Therefore, to my mind, the learned Magistrate must then go the complete mile and ensure that the submission, when filed, is considered. That would then corroborate the fact of procedural fairness being upheld and safeguarded. It is improper for the court to direct or order counsel to file written submissions, and then not have any regard to it.

[13] In *Diana Nelson Tanoja v. PP* [2010] 3 CLJ 1 FC one of the issues canvassed by the appellant before the Federal Court was whether it was mandatory for the trial judge to hear submission from counsel before giving his decision at the close of trial. A question that is directly on point with the issue raised by the appellant herein, *albeit* that in *Diana Nelson Tanoja* the trial was in the High Court (where s. 181(1) of the CPC would apply), whilst in the present case it was before the Magistrate (where s. 174(b) of the CPC would apply). Alauddin Mohd Sheriff PCA in delivering the judgment of the Federal Court in *Diana Nelson Tanoja* held as follows:

> [33] The next question we ask is whether the learned trial judge is obliged to hear submissions from counsel and DPP before he gives his decision?
>
> [34] In other words, is it mandatory for the learned trial judge to hear submissions before giving his decision?
>
> [35] In our judgment it is not mandatory for the learned trial judge to hear submission from learned counsel before giving his decision.
>
> [36] Section 181(1) of the Criminal Procedure Code provides:
>
> > When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks

> necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) **may sum up his case** ... (emphasis added).
>
> [37] The word 'may' indicates a discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. Therefore the learned trial judge could if he wanted to, decide without having the need to hear submission from defence counsel. Submission is not evidence and hence the judgment is not defective. If the law categorically states that it is not mandatory for counsel to make submission, we can see no reason why it is mandatory for the learned trial judge to hear submission. What, if learned counsel chooses not to make submission? Is the learned trial judge still obliged to call upon learned counsel to make submission? If indeed the law intends that the learned trial judge should hear submission than it would say so in no uncertain terms.

[14] The Federal Court in *Diana Nelson Tanoja* states that there is no mandatory automatic requirement for the trial judge to hear closing arguments at the close of defence case. The Federal Court points out that submission at this stage is discretionary and mandatory. The discretionary nature of the right arises from the express wordings of the statute ie, "may sum up his case" – meaning the accused may sum up his case. Thus, the discretion is that of the accused. In making that decision the Federal Court was not referred to its earlier decision in *Lee Kwan Woh*, therefore it did not have the benefit of the lengthy reasoning and pronouncement of the Federal Court in that case. Both stand as decisions of the apex court, which is binding on me by virtue of the doctrine of *stare decisis*. Therefore, to my mind, the combined effect of the two Federal Court cases of *Lee Kwan Woh* and *Diana Nelson Tanoja* is that the accused has the choice to make submissions at both stages of proceedings, ie, at the close of the prosecution to the effect that the prosecution has failed to establish a *prima facie* case, and at the close of the defence case to the effect that the prosecution has failed to prove a case beyond reasonable doubt. If the accused elects not to make any submissions at the close of either stages of the trial, then there is no requirement for the court to hear any submissions. Thus, the law does not mandate the court to hear submissions. However, if the accused elects to address the court at the close of either stage of proceedings, then it is incumbent for the court to afford that right to the accused. The failure to accord the accused this right, if he so elects to sum up the case, would be a violation of the accused's constitutional rights to a fair trial as embodied in art. 5(1) of the Federal Constitution. And this is stated in no uncertain terms by Gopal Sri Ram FCJ in *Lee Kwan Woh*. Therefore, in this case, where the appellant had elected to file written submissions, and indeed where the learned Magistrate had directed counsel for parties to file written submissions, it would in my opinion be incumbent upon the learned Magistrate to consider the

submissions filed, otherwise the fairness of the trial procedure becomes questionable. Public confidence in the trial process is the cornerstone of any successful criminal justice system. Administration of criminal justice is enhanced where there is discernable procedural fairness in the trial process. Therefore, when an accused is directed or even ordered to file written submissions, and he follows that direction or order, it would then not be open to the court to disregard or not consider that submission. Such an act would not encourage confidence in the administration of criminal justice. As the adage goes, justice must not only be done but also seen to be done. Court's adherence to its own directions would go towards showing that justice is being done and would promote confidence in the system.

[15] In her alasan penghakiman (p. 74 of the record of appeal) the learned Magistrate states that she had "meneliti hujahan kedua-dua belah pihak" before finding that the appellant had failed to raise any reasonable doubt and convicting the appellant. However, the evidence indicates otherwise. The learned Magistrate had not or could not have considered the closing submissions of learned counsel for the appellant before arriving at her decision to convict the appellant on 29 October 2015. The date of the alasan penghakiman is 30 September 2015, whereas the appellant's counsel's submissions were filed in court only on 2 October 2015. Thus, it would not have been possible for the learned Magistrate to have referred to or considered the submissions of learned counsel for the appellant before delivering judgment. Further, the query of the learned Magistrate just before delivering her judgment on 29 October 2015 as to whether counsel for the appellant had filed his written submissions, and the contents of the "Nota Keterangan Tambahan" and the CRT recording seems to suggest that the learned Magistrate had not seen or considered the appellant's counsel's written submissions summing up the case.

[16] Therefore, I am of the opinion that procedural fairness has been sacrificed at the alter of justice, and that should not be so. The appellant has been deprived of his constitutional right to procedural fairness when his closing submissions were not considered by the court, despite the court having directed parties to file written submissions, and the appellant having elected to sum up his case pursuant to the provisions of s. 174(b) of the CPC. This is a clear infringement of the appellant's constitutional rights as was stated by Gopal Sri Ram FCJ in *Lee Kwan Woh*:

> But what the trial court cannot lawfully do is to deprive an accused of his constitutionally guaranteed right to a fair trial by denying him or her of the opportunity to make a submission of no case.

In my opinion, that constitutional right is available at both stages, ie, close of prosecution's case and the close of the defence case, where the accused has given sworn testimony and/or called witnesses on his behalf. In this regard,

it is also worth having regard to the pronouncement of Murray-Aynsley CJ in *Manickam v. R* [1947] 1 LNS 60; [1948] MLJ 185c, where the learned Chief Justice said:

> The only point in this case is whether Counsel for the appellant should have been allowed to address the Magistrate. After the close of the case for the complainant counsel made a submission which was overruled. Then the appellant gave evidence himself but no witnesses were called on his behalf. Counsel wished to address the Court after the appellant had given evidence. The question of the right of parties and counsel to make speeches in summary cases is in a state of some confusion. It was dealt with at length by Horne J in the case of *Lam Heng* [1937] MLJ 154. There the learned Judge came to the conclusion that the address by counsel must in a case like the present one be made after the person accused has given his evidence and not before. I do not agree entirely with the reasoning of that learned Judge but **I consider that both from the point of view of the defence and also in the interests of justice it is desirable that any address by counsel should be made at that stage.** (emphasis added)

Similarly in *Mahindar Singh v. PP* [1941] 1 LNS 39; [1941] MLJ 230, Terell Ag CJ had, in allowing the appeal and setting aside the conviction and ordering a retrial following a complaint that the accused had been deprived of his right to submit at the close of case, said:

> This was an appeal by the accused who was found guilty of an offence under section 324 of the Penal Code and sentenced to a fine of $75 or one month's rigorous imprisonment. *The eighth ground of appeal alleges that the accused's counsel was never given an opportunity of addressing the Court at the close of the case. This is admitted by the learned Deputy Public Prosecutor and constitutes a serious irregularity. In view of this there is no necessity to enter into the merits of the conviction.The appeal will be allowed, the conviction set aside and a new trial ordered.* (emphasis added)

In the circumstance, I am of the considered view that in the interest of justice the conviction ought to be set aside and a new trial ordered before another Magistrate.

[17] The violation of the appellant's right to a fair trial is not the only ground of complaint. There are two other grounds of appeal wherein the cumulative complaint is that the learned Magistrate failed to judicially appreciate the evidence and that the grounds of judgment do not convey a reasoned judgment of the facts and law. I now turn to address these issues.

[18] It is well settled law that the grounds of decision must convey a reasoned judgment of the facts and law. This was reiterated in *Balasingham v. PP* [1959] MLJ 193 by Ismail Khan J (as he then was) in the following words:

A The trial Court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the Appellate Court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a "speaking" judgment needs no emphasis. In fact in *Murugiah v. Public Prosecutor* [1941] MLJ 17 and *Public Prosecutor v. Low Toh Seng* [1941] MLJ
B 1 both Horn J and Terrell Ag. CJ felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial Judge in arriving at the ultimate finding.

[19] The requirement for a speaking judgment was reemphasised by the
C Federal Court in *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1 where Shaik Daud Ismail JCA in delivering the judgment of the Federal Court said at p. 6:

First and foremost we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that
D they do not convey a "speaking" judgment although the importance of this has been stressed in a number of decided case. (See, for example, *Balasingam v. PP* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v. PP* [1940] 1 LNS 59[1941] MLJ 17 per Horne J).

[20] The learned counsel for the appellant submits that the learned
E Magistrate had at the close of prosecution's case found the complainant (SP1) a non-credible witness. In fact in the alasan penghakiman, the learned Magistrate spells out that finding as follows:

Mahkamah setelah mendengar dan menliai keterangan SP1 secara total memutuskan bahawa saksi adalah tidak dipercayai. Ini kerana, sepanjang
F saksi memberi keteranagn didapati bahawa keterangan yang diberikan adalah meragukan dan banyak bercanggah.

...

Selain itu, Mahkamah mendapati bahawa keterangan yang ada tidak menunjukkan bahawa OKT telah menggunakan kekerasan jenayah
G terhadap SP1. **Sebaliknya, keterangan SP1 sendiri menunjukkan bahawa beliau merelakan perbuatan OKT terhadapnya.**

...

Setelah meneliti keseluruhan keterangan SP1, Mahkamah memutuskan bahawa keterangan yang diberikan oleh pengadu adalah tidak
H menyakinkan dan penuh dengan keraguan.

[21] The learned Magistrate had, following that finding, acquitted and discharged the appellant at the close of prosecution's case. The High Court had reversed that finding and ordered the appellant to enter his defence on
I the charge. The appellant's defence was one of consent. The appellant testified that the acts complained by the complainant (SP1), ie, the appellant holding the complainant's body, groping and kissing her, was done with her

consent, ie, that it was a consensual encounter between the complainant and the appellant in the hotel room. The learned Magistrate rejected this defence. The learned Magistrate seems to now find the complainant (SP1) a credible witness and accept her version of events. In this regard, I agree with submissions of learned counsel for the appellant, the learned Magistrate has failed to provide reasons for her about turn in now finding SP1 a credible witness. Learned counsel for the appellant points out this lack of reasoning shows that the learned Magistrate has not adequately addressed her mind to this issue, more so when the High Court in calling for the appellant to enter his defence did not touch on the issue of SP1's credibility at all.

[22] I find merit in that contention. The learned Magistrate's earlier finding as laid down in the alasan penghakiman was "Sebaliknya, keterangan SP1 sendiri menunjukkan bahawa beliau merelakan perbuatan OKT terhadapnya." Now, if her earlier finding was that SP1 had consented to the act, why then her subsequent converse finding at the close of defence case. The learned Magistrate has failed to give any reasons for her reversal of finding in respect of this very crucial and all-important issue.

[23] Further, learned counsel for the appellant submits that there conflicting findings of fact by the learned Magistrate in the alasan penghakiman. At p. 7 of the alasan penghakiman (p. 83 of the record of appeal) the learned Magistrate has found as follows:

> Selain itu juga, Mahkamah mendapati bahawa keterangan yang ada tidak menunjukkan bahawa OKT telah menggunakan kekerasan jenayah terhadap SP1. Sebaliknya, keterangan SP1 sendiri menunjukkan bahawa beliau merelakan perbuatan OKT terhadapnya. Ini dapat dilihat melalui tindakan mangsa yang tidak menjerit meminta pertolongan tatkala OKT memeluknya. Alasan mangsa bahawa mulut beliau ditutup oleh OKT sukar untuk diterima oleh Mahkamah kerana mengsa boleh menjerit pada masa OKT memeluknya dari arah belakang. Malangnya mangsa tidak mengambil peluang tersebut. Tindakan mangsa ini seolah-olah menunjukkan bahawa mangsa merelakan perbuatan OKT tehadapnya dan ini sekaligus menafikan bahawa OKT telah menggunakan kekerasan jenayah terhadap mangsa.

And at p. 15 of the alasan penghakiman (p. 91 of the record of appeal) the learned Magistrate makes the following contradictory findings:

> Maka, pembelaan OKT bahawa mangsa merelakan adalah tidak masuk akal. Mahkamah berpandangan reaksi mangsa yang tidak menjerit tatkala kejadian berlaku tidak menunjukkan yang mangsa merelakan perbuatan tersebut memandangkan alasan yang diberikan mangsa iaitu mangsa menutup mulutnya bagi megelak lidah OKT daripada memasuki mulutnya adalah logic untuk diterima akal.

[24] I agree that these findings at separate stages of the proceedings, ie, one at the close of prosecution's stage and the other at the close of the defence case, are definitely contradictory. On the same set of evidence, the learned Magistrate has made two contradicting findings of fact. This is untenable. This contradictory findings of fact goes to the crux of the appellant's defence, which is, that the act complained was done with the consent of the complainant. Thus, the decision given by the Magistrate is not a reasoned judgment on the facts and the law.

[25] I have considered the argument of the learned deputy that this court can address all the issues raised by the appellant by way of a rehearing and thus the appellant is not deprived of a fair trial. Even though the appeal is a rehearing, considering the gravity of the misdirection by the learned Magistrate, I find that it would be unsafe to allow the conviction to stand, and that it would be more prudent for me to allow the appeal and order a retrial.

[26] Wherefore, I allowed the appeal, set aside the conviction, and ordered a retrial before another Magistrate.

Orders accordingly.